

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

CUPERTINO SALVADOR

Claimant

V.

TYSON FRESH MEATS, INC.

Self-Insured Respondent

)
)
)
)
)
)

Docket No. 1,043,100

ORDER

Claimant appealed the July 30, 2014, Review & Modification Decision entered by Administrative Law Judge (ALJ) Pamela J. Fuller. The Board heard oral argument on December 9, 2014.

APPEARANCES

Scott J. Mann of Hutchinson, Kansas, appeared for claimant. Carolyn McCarthy of Kansas City, Missouri, appeared for respondent.

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Review & Modification Decision. The record also includes the transcript of the April 7, 2014, deposition of claimant and exhibit thereto. The parties stipulated claimant sustained a post-accident wage loss of 13%.

ISSUES

The parties entered into an Agreed Award on March 20, 2013. Claimant was awarded permanent partial disability benefits based upon a 5% whole body functional impairment for an October 14, 2008, work accident. Claimant retained the right to apply for review and modification of the Agreed Award. Claimant filed an Application for Review and Modification on January 3, 2014. The July 30, 2014, Review & Modification Decision awarded claimant an additional 6.23 weeks of permanent partial disability benefits for a 6.5% work disability.

Claimant appealed and listed nature and extent of claimant's work disability as the sole issue in his application for review. Claimant asks the Board to find he sustained a 100% task loss as opined by Dr. C. Reiff Brown, which results in a 56.5% work disability.

In the alternative, claimant requests the Board average the task loss opinions of Drs. Brown and Terrence Pratt for a 50% task loss, resulting in a 31.5% work disability. Claimant filed neither a submission letter to the ALJ nor a brief to the Board.

Respondent requests the Board dismiss the appeal because claimant did not file a brief. In the alternative, respondent asks the Board to affirm the Review & Modification Decision because claimant sustained no task loss.

The issues before the Board on this appeal are:

1. Should claimant's appeal be dismissed for failure to file a brief?
2. What is the nature and extent of claimant's disability?

FINDINGS OF FACT

After reviewing the entire record and considering the parties' arguments, the Board finds:

Claimant sustained neck and head injuries as the result of an October 14, 2008, accident arising out of and in the course of his employment with respondent. The parties entered into an Agreed Award on March 20, 2013, wherein claimant was compensated for a 5% whole body functional impairment. Claimant's right to review and modification was left open. In the Agreed Award, the parties stipulated claimant's average weekly wage was \$702.63, not including fringe benefits.

Claimant did not testify at the review and modification hearing, but was deposed on April 7, 2014. He testified that on the date of his work accident, he was a split saw operator making \$14.75 per hour and at times, worked overtime. Claimant indicated he began working for respondent as a split saw operator in 1995. He continued in that job until sometime after the Agreed Award on March 20, 2013, when he was moved to a low trim job and his wages reduced to \$13.20 per hour. Claimant testified respondent made him move to the low trim job. He indicated he did not want to move to the new job. Claimant testified he was now making \$14.05 per hour and worked 36 or 37 hours per week. A wage statement introduced at claimant's deposition showed claimant's average weekly wage from April 6, 2013, through November 23, 2013, was \$609.91.

Claimant was evaluated by Dr. C. Reiff Brown on November 2, 2011, and the doctor testified on May 14, 2014. By order of the ALJ, claimant was evaluated by Dr. Terrence Pratt on March 13, 2012, and the doctor testified on July 15, 2014. The ALJ's Review & Modification Decision sets out findings of fact regarding the evaluations, opinions and testimony of Drs. Brown and Pratt that are detailed and accurate and it is not necessary to repeat those facts herein. However, the Board would like to highlight several facts.

Dr. Brown's November 2, 2011, report indicated that after being treated for his 2008 work accident, claimant was released without restrictions by Dr. Baughman. Thereafter, claimant returned to his job as a split saw operator, performing his regular job duties. Dr. Brown indicated claimant had work injuries in 2006 and 2008. The doctor indicated the restrictions he provided for claimant's 2006 and 2008 work injuries were the same. Dr. Brown confirmed he has not seen nor spoken to claimant since 2011, had no knowledge of claimant's current abilities and did not know if claimant had followed the restrictions. The doctor admitted having no idea if claimant continues to perform some of the same work activities he performed prior to the 2008 work injury.

At Dr. Brown's deposition, a functional capacity evaluation (FCE) performed on March 9, 2011, by Cassandra Boyd, an assessment specialist with Dr. Baughman's office, was placed into evidence. Dr. Brown testified he was in agreement with the FCE and the FCE was valid. The doctor indicated his task loss opinion was based upon claimant's permanent work restrictions, which, in turn, were based upon the FCE.

Dr. Pratt diagnosed claimant in March 2012 with cervicothoracic syndrome with reported minimal spondylosis, a history of left shoulder syndrome and a history of chest and eye contusions. The doctor testified he provided no restrictions for claimant's cervicothoracic spine injury following the 2008 work injury and claimant sustained no task loss in relation to his cervical region. The doctor indicated he was not comfortable addressing claimant's task loss relative to his overall physical condition. Dr. Pratt was asked about the FCE, but he testified he had not seen it.

Rehabilitation counselor Robert W. Barnett, Ph.D., performed a task analysis. Based upon his interview with claimant, Dr. Barnett determined split saw operator was the only position claimant held at respondent from 1995 until October 14, 2008, the date of his accident. Dr. Barnett identified three job tasks claimant performed as a split saw operator.

PRINCIPLES OF LAW AND ANALYSIS

Respondent's request to dismiss claimant's appeal

Claimant failed to send a submission letter to the ALJ and to file a brief with the Board. K.A.R. 51-3-5 requires each party to send a submission letter to the ALJ before the ALJ issues a decision. However, there is no penalty if a submission letter is not sent. K.A.R. 51-3-5, in part, states:

If there is a dispute between the employer and the worker as to the compensation due and hearings are held before the administrative law judge for a determination of the issues, upon completion of submission of its evidence, each party shall write to the administrative law judge a letter submitting the case for decision. The administrative law judge shall not stay a decision due to the absence of a submission letter filed in a timely manner. The submission letter shall contain a list

of the evidence to be considered by the administrative law judge in arriving at a decision. . . .

There is no statute requiring a party, on an appeal to the Board, to file a brief. K.A.R. 51-18-2, *et seq.*, sets forth the process of appeals to the Board. K.A.R. 51-18-4(a) states:

Following an application for review by the workers compensation board, each brief that a party files shall be served upon opposing counsel and thereafter filed with the workers compensation board, division of workers compensation, according to the following schedule.

(1) The appellant's brief shall be submitted within 30 days from the date of filing the application for review.

(2) The appellee's brief shall be submitted within 20 days thereafter.

(3) The appellant may submit a reply brief limited to new issues raised in the appellee's brief within 10 days thereafter.

An original and five copies of each brief shall be filed with the workers compensation board. Every brief shall be supplied in two copies to all counsel of record.

K.A.R. 51-18-4(a) contains no provision allowing the Board to impose a penalty upon a party for failure to file a brief. Nor can the Board find a prior appellate court or Board decision wherein an appeal to the Board was dismissed for failure of a party to file a brief.

An appellant's failure to file a brief can put an appellee at a disadvantage. When the appellant does not file a brief, it keeps the appellee in the dark concerning the appellant's arguments and authorities until oral argument. Admittedly, this is not a complicated case and the issues and arguments are readily discernible. However, that is no excuse for claimant not to file a brief. The best practice for parties appearing before the Board is to timely file briefs. Filing briefs should not be viewed as a burden, but rather an opportunity for parties to present their arguments and authorities to the Board in advance of oral argument. Moreover, filing a brief is a simple courtesy to opposing counsel and the Board. If the Board had authority to require parties to file briefs and enforce that requirement, it would do so. However, the Board has no such authority.

Nature and extent of claimant's disability

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that

right depends.¹ “Burden of proof’ means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party’s position on an issue is more probably true than not true on the basis of the whole record.”²

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has a responsibility of making its own determination.³

K.S.A. 44-528 states, in part:

(a) Any award or modification thereof agreed upon by the parties, except lump-sum settlements approved by the director or administrative law judge, whether the award provides for compensation into the future or whether it does not, may be reviewed by the administrative law judge for good cause shown upon the application of the employee, employer, dependent, insurance carrier or any other interested party. In connection with such review, the administrative law judge may appoint one or two health care providers to examine the employee and report to the administrative law judge. The administrative law judge shall hear all competent evidence offered and if the administrative law judge finds that the award has been obtained by fraud or undue influence, that the award was made without authority or as a result of serious misconduct, that the award is excessive or inadequate or that the functional impairment or work disability of the employee has increased or diminished, the administrative law judge may modify such award, or reinstate a prior award, upon such terms as may be just, by increasing or diminishing the compensation subject to the limitations provided in the workers compensation act.

...

(d) Any modification of an award under this section on the basis that the functional impairment or work disability of the employee has increased or diminished shall be effective as of the date that the increase or diminishment actually occurred, except that in no event shall the effective date of any such modification be more than six months prior to the date the application was made for review and modification under this section.

K.S.A. 44-510e(a) provides that an injured worker is not entitled to work disability in excess of the functional impairment so long as his or her post-injury wages are equal to

¹ K.S.A. 2008 Supp. 44-501(a).

² K.S.A. 2008 Supp. 44-508(g).

³ *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212 (1991).

90% or more of the wages he or she was earning at the time of the work injury. Claimant's post-injury wages are less than 90% of the wages he was earning at the time of his October 14, 2008, work injury, thus entitling him to a work disability.

Claimant seeks a work disability based upon reduced wages and task loss. Claimant asks the Board to adopt the task loss opinion of Dr. Brown or to average the task loss opinions of Drs. Brown and Pratt. At oral argument, claimant asserted that only Dr. Brown had the benefit of the March 9, 2011, FCE and, therefore, his task loss opinion is credible.

No physician opined claimant's functional impairment increased since his work accident on October 14, 2008. Claimant performed the same job tasks as a split saw operator from 1995 until his accident on October 14, 2008. After returning to work following his accident, claimant continued working as a split saw operator until sometime after March 20, 2013, the date of the Agreed Award. For approximately four years after his work accident, claimant performed the same job tasks Dr. Brown opined claimant could not perform due to his restrictions. That supports the ALJ's finding that Dr. Pratt's task loss opinion was more reliable than Dr. Brown's.

Dr. Pratt diagnosed claimant's neck injury as cervicothoracic syndrome with reported minimal spondylosis. The doctor gave claimant no restrictions for his cervical condition and indicated he had no task loss. Moreover, Dr. Pratt performed a court-ordered IME, whereas Dr. Brown was employed by claimant. The Board affirms the ALJ's finding that claimant sustained no task loss.

CONCLUSION

Claimant sustained a 13% wage loss and a 0% task loss for a 6.5% work disability.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.⁴ Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, the Board modifies the July 30, 2014, Review & Modification Decision entered by ALJ Fuller to modify the effective date of the work disability to July 3, 2013, pursuant to K.S.A. 44-528(d), but otherwise affirms the Review & Modification Decision.

⁴ K.S.A. 2013 Supp. 44-555c(j).

IT IS SO ORDERED.

Dated this ____ day of February, 2015.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Scott J. Mann, Attorney for Claimant
sjm@mannlaw.kscoxmail.com; clb@mannlaw.kscoxmail.com

Carolyn McCarthy, Attorney for Respondent
cmccarthy@mwklaw.com

Honorable Pamela J. Fuller, Administrative Law Judge